Supreme Court, U.S.
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No. 91-320

In The

Supreme Court of the United States

October Term, 1991

THOMAS V. BARNES, et al.,

Petitioners,

v.

JAMES C. MATLOCK,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

PAUL A. LEONARD, JR.
GOODMAN BALL & VAN BOKKELEN
PROFESSIONAL CORPORATION
3737 45th Street
Highland, IN 46322
(219) 924-9200

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESPONDENT'S STATEMENT OF THE CASE

James Matlock filed a complaint in the Northern District Court of Indiana alleging that the City of Gary, Mayor Thomas v. Barnes, Deputy Mayor Richard Comer, Personnel Director Beulah Ware, and Corporation Counsel Gilbert King, improperly demoted him from his position of legal investigator in the Gary City Law Department to the position of jail turnkey in the Gary City Jail, in retaliation for his political support of candidates opposed by Barnes and his administration, and for Matlock's continuing support of former Mayor Richard Hatcher who Barnes had defeated in a bitter political primary election, and in violation of his First and Fourteenth Amendment Rights to the United States Constitution and 42 U.S.C. 1983. The case was tried against all defendants in their official and individual capacities. Prior to trial the District court had granted partial summary judgment in favor of Matlock finding that there was no dispute of material fact that the decision of Comer, King and Ware to demote Matlock was politically motivated. All other factual issues such as the duties of a legal investigator for the Gary City Law Department, the participation of defendant Barnes and the liability of the City of Gary for the transfer of Matlock were submitted to a jury, and following a five day trial, the jury returned a verdict in favor of Matlock on all issues. Prior to the entry of the judgment on the verdict, Matlock moved to voluntarily dismiss the defendant officials in their individual capacities. The District Court granted the voluntary dismissal and entered judgment accordingly against the City of Gary and the defendants in their official capacities. In a comprehensive opinion, the Seventh Circuit Court of

Appeals affirmed the judgment of the District Court on all issues, including damages and attorney fees, with respect to defendants Barnes and the City of Gary, and vacated the judgments against Comer, Ware and King, and directed the District Court to dismiss the suits against these three officials by virtue of Matlock's voluntary dismissal of these defendants in their individual capacities.

The defendants do not challenge the trial court's instructions or the jury's verdict rendered against Barnes and the City of Gary. Instead, the defendants again inappropriately raise their qualified immunity argument, rendered moot (and so held by the Seventh Circuit Court of Appeals in its order dismissing the consolidated interlocutory appeals of the defendants as moot, Appendix, pages B-1 to B-3, and again by the Seventh Circuit Court of Appeals in its order affirming the District Court's decision, Appendix, page A-13) by virtue of Matlock's voluntary dismissal of the defendants in their individual capacities, and further assert on appeal that Matlock occupied as a matter of law a policymaking or confidential position, assertions which were rejected by the jury at trial and by the Seventh Circuit Court of Appeals.

RESPONDENT'S REASONS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISPOSING OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND THE SEVENTH CIRCUIT DID NOT SANCTION ANY ABUSE OF THE DISTRICT COURT'S DISCRETION.

The defendants offer no legal authority whatsoever to support their charge that the Seventh Circuit Court of Appeals approved and sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings. Defendant's charge that the District Court improperly failed to rule on the qualified immunity issue is blatantly false. In its Order of October 23, 1989, the District Court extensively analyzed and discussed the defendants' qualified immunity argument and refused to enter summary judgment because: "As in any case involving a factual dispute, the actual duties of the investigator position must be resolved by the jury. Accordingly, special interrogatories will be submitted to the jury concerning the duties of the investigator. After the jury resolves any factual disputes, this Court will determine whether the defendants' conduct violated a clearly established law at the time the decision was made. *See generally Jones*, 856 F.2d at 994-995; and *Rakovich*, 859 F.2d at 1201-02. Therefore, summary judgment is inappropriate." Appendix, pages E-36-37. The Seventh Circuit did not find any abuse of discretion with the District Court's handling of this issue, nor have the defendants included in their petition any citation to statute, rule or case to

suggest that the District Court deviated from appropriate judicial procedure.

II. THE DISTRICT COURT DID NOT ERR IN GRANTING MATLOCK'S MOTION TO DISMISS THE DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES AND THE SEVENTH CIRCUIT CORRECTLY DISPOSED OF THE DEFENDANTS' QUALIFIED IMMUNITY ARGUMENT AS MOOT.

The defendants further assert, again without any authority, that the District Court (and Seventh Circuit upon review) deviated from appropriate judicial procedure by dismissing the individual defendants upon Matlock's voluntary motion. No statute, rule or case is offered to show any impropriety, error or prejudice suffered by the individual defendants. As correctly stated by the Seventh Circuit, "A win is a win, however, and defendants cannot appeal from a judgment that is not adverse." Seventh Circuit Opinion, footnote 3, Appendix page A-13.

Contrary to the defendant's assertion that the District Court was in conflict with this Court's precedent on the issue of qualified immunity, there is no conflict because Matlock's dismissal of the defendants in their individual capacity rendered the issue moot, as correctly noted by the Seventh Circuit in its opinion. Seventh Circuit Opinion, footnote 3, Appendix page A-13. Moreover, since the defendants have not appealed from the jury verdict and judgment against the City of Gary and Mayor Barnes, the defendants have waived the issue of whether Matlock could be transferred, as opposed to fired, for his political beliefs and affiliations. The defendants cannot resurrect

through the qualified immunity argument (which is moot) an issue that defendants wholly failed to raise and preserve on appeal. ("The suits against Comer, Ware and King have been rendered moot by defendant's failure to appeal successfully from the jury verdict against Barnes and the city. The only suits remaining in this case are those against the officials in their official capacities . . . The jury found Mayor Barnes and the city of Gary liable for the politically motivated transfer[1] of Matlock, and the defendants do not successfully challenge these verdicts." Seventh Circuit Opinion, Appendix, pages A-13 and 14; citations and footnotes omitted.) Whatever the merits of defendants' argument regarding the legality of Matlock's transfer, defendants have wholly failed to properly raise it on appeal. Therefore, there is no issue properly presented in the defendants' petition to be decided by this Court.

III. THERE IS NO CONFLICT WITHIN THE SEVENTH CIRCUIT RESULTING FROM *MATLOCK* AND *HUDSON V. BURKE*, NOR IS *MATLOCK* IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

The defendants incorrectly assert that a conflict now exists within the Seventh Circuit between the *Matlock v. Barnes*, 932 F.2d 658 (7th Cir. 1991) and *Hudson v. Burke*, 913 F.2d 427 (7th Cir. 1990) decisions, and invites this

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[1] While defendants note the Seventh Circuit erroneously referred to Matlock's firing in footnote four of its opinion, it is clear in the text that the Seventh Circuit was cognizant of Matlock's transfer.

Court to settle the issue by holding that a legal investigator per se is subject to patronage dismissal and transfer, and specifically overrule the prior decisions in *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); and *Rutan v. Republic Party of Illinois*, 110 S.Ct. 2729 (1990), 868 F.2d 943 (7th Cir. 1989). This Court should decline defendants' invitation for the reason that there is no conflict within the Seventh Circuit. A review of the Seventh Circuit Opinion in *Matlock* shows that the court was quite aware of its recent holding in *Hudson v. Burke* that legal investigators assigned to the Chicago City Council Finance Committee occupied a policymaking position and that political affiliation was an appropriate consideration for their hiring and firing. In reference to Matlock, the Seventh Circuit states specifically:

> "Defendants here utterly failed to introduce comparable evidence about the policymaking nature of the legal investigator's job in the city of Gary Law Department. Nowhere in the transcripts is there any suggestion that the Department regarded the settlement of the claims it handled as political matters. There was no evidence that the Department made policy or set goals for the city of Gary. The defendants' witnesses testified that the Department did not hire or fire on the basis of political affiliation generally, suggesting that city officials considered jobs within the Department to be non-policymaking. Matlock himself testified that he could not have been hired for his political affiliation because at the time he applied for the job, he had none. . . .

> The jury was in the best position to assess the credibility of the defendants' arguments about the need for secrecy in the Department, and its finding that Matlock's position was non-confidential as well as non-policymaking will not be overturned. Nothing in the record demonstrates that the legal investigator position was generally one for which political affiliation is an appropriate requirement. . . . " Seventh Circuit Opinion, Appendix, pages A-11 and 12.

The Seventh Circuit extensively contrasted and distinguished the issues and facts in the *Matlock* and *Hudson v. Burke* cases. The opinions are not in conflict, but are in fact complimentary by providing vivid examples of when an "investigator" is and is not a policymaking position. Defendants' suggestion that this Court make new law by ignoring the facts and basing the protection of Constitutional Rights of Free Speech and Political Affiliation merely on the job title that one is given is to invite this Court to sanction the wholesale abuse of these Rights for the sake of legal simplicity.

CONCLUSION

Matlock submits that the protection of Constitutional Rights of Free Speech and Political Affiliation from the well-documented abuses of patronage politics is not supposed to be simple. As this Court has pointed out in numerous prior opinions the issues involve a delicate balance between legitimate interests in efficient governmental policymaking and implementation and the protection of individual rights of speech and political affiliation.

The balance may be difficult to draw at times, but the importance of the competing interests at stake require the effort. The District Court and the Seventh Circuit Court of Appeals were correct in their decisions, and *Matlock* is not a departure from, but a clear and careful application of precedent from this Court and from the Seventh Circuit. There is no reasonable basis or compelling legal issue to warrant the granting of the defendants' Petition for Writ of Certiorari, and, therefore, the same should be denied.

Respectfully submitted,

PAUL A. LEONARD, JR.
Attorney for Respondent
GOODMAN BALL & VAN BOKKELEN, P.C.
3737 45th Street
Highland, Indiana 46322
(219) 924-9200